No. 18757

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROY EUGENE MORRIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

FRANCIS C. WHELAN,
United States Attorney,

THOMAS R. SHERIDAN,
Assistant U. S. Attorney,
Chief, Criminal Section,

JO ANN DUNNE,
Assistant U. S. Attorney,

600 Federal Building,
Los Angeles 12, California,

Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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APPELLEE'S BRIEF.

I.

JURISDICTION AND STATEMENT OF THE CASE.

On March 27, 1963, the appellant, Roy Eugene Morris, was indicted by the Federal Grand Jury for the Southern District of California, in a Three-Count Indictment, which charged that beginning on or about December 8, 1960, and continuing to the date of the return of the Indictment, the appellant devised a scheme and artifice to defraud Ruth A. Korn and to obtain money from such person by means of the following false and fraudulent pretenses, representations and promises which he well knew to be false when made: That he would look for a house trailer for Ruth A. Korn in Phoenix, Arizona; that he would purchase this house trailer for Ruth A. Korn with money that she would send him. This scheme was alleged in all counts of the Indictment; but each count described a different interstate transmission by wire: a tele-

phone call from Phoenix, Arizona, to Blythe, California, on January 11, 1961 in Count One; a telephone call from Phoenix, Arizona, to Blythe, California, on January 17, 1961 in Count Two; a Western Union telegram from Blythe, California, to Arizona, on January 17, 1961 in Count Three. [C. T. 2-4.]*

On April 30, 1963, appellant filed a Motion to Narrow Indictment to One Count and a Motion for Dismissal of Count Two of the Indictment. Both motions were denied. [C. T. 12-15, 18.]

On May 1, 1963, in the United States District Court for the Southern District of California, the Honorable Harry C. Westover presiding, the jury returned a verdict of not guilty on Count One and guilty on each of Counts Two and Three. [C. T. 19-20.]

On May 1, 1963, appellant filed a Motion for Judgment of Acquittal and also, renewed his Motion for Dismissal of Count Two of the Indictment and his Motion for Judgment of Acquittal on Count One. [C. T. 16-17, 19.] On May 3, 1963, appellant filed a written Motion for Dismissal of Count Two of the Indictment. [C. T. 22-25.] On May 6, 1963, all three motions were denied. [C. T. 28.]

On May 20, 1963, the appellant was sentenced to the maximum period authorized by law on each of Counts Two and Three, the sentence to begin and run concurrently; and for a study as described in Title 18, United States Code, Section 4208(c), the results of such study to be furnished the sentencing court, whereupon the sentence of imprisonment would be subject to modification in accordance with Title 18, United States Code, Section 4208(b). [C. T. 29.]

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*C. T. refers to Clerk's Transcript.

Although not contained in the transcript of record, it is to be noted that the results of such study were furnished to the sentencing court; and on September 30, 1963, the United States District Judge ordered that the maximum sentences of imprisonment heretofore imposed be reduced and modified to a period of three years on each of Counts Two and Three of the Indictment, the sentences to begin and run concurrently; and it was furthered ordered that execution of the sentences be suspended and defendant was placed on probation for a concurrent period of three years on each of the said counts.

On May 21, 1963, the appellant filed a notice of appeal. [C. T. 30.]

The jurisdiction of the District Court was predicated on Title 18, United States Code, Sections 1343 and 3231, and this Court has jurisdiction to entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.

II.
STATUTE INVOLVED.

Title 18, United States Code, Section 1343, provides in pertinent part:

> "Whoever having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or caused to be transmitted by means of wire . . . in interstate or foreign commerce, any writing, . . . or funds for the purpose of executing such scheme or artifice, shall be fined not more than $1000 or imprisoned not more than five years, or both."

III.
STATEMENT OF THE FACTS.

On December 8, 1960, the appellant, Roy Eugene Morris, rented accommodations at the Valley Motel, in Blythe, California. He was accompanied by a Leona Moore, who registered as appellant's wife. [R. T. 18, 79-80.]*

Appellant was unemployed and in order to reduce the motel rent, he worked as a "handy man" for the motel owner, Ruth Korn. [R. T. 16, 19-20, 32-33, 81-82.]

During a discussion between appellant and Ruth Korn, she displayed an interest in acquiring a house trailer. Appellant said he would try to locate a trailer. [R. T. 20.] This conversation occurred in the first week of January, and on January 9, 1961, appellant and Leona Moore checked out of the Valley Motel. [R. T. 20-21.]

A couple of days after their departure, appellant telephoned from Phoenix, Arizona, to inform Ruth Korn that after contacting three finance companies, appellant had located six trailers which could be purchased for the sum of $5,000. Ruth Korn said she didn't want that many trailers and she didn't have that much money to spend. [R. T. 21-22, 38.]

On January 17, 1961, appellant telephoned from Phoenix, Arizona. In Miss Korn's absence, appellant spoke to Mattie Van Horn, a resident of the Valley Mo-

*R. T. refers to Reporter's Transcript.

tel. Appellant said he had located a trailer and requested that Ruth Korn wait for his next phone call. [R. T. 52-53.]

Ruth Korn was present at the Valley Motel when appellant again telephoned from Arizona on January 17, 1961. Appellant stated that he had located a repossessed trailer, 1958 model, National, and that the price was approximately $931. [R. T. 24.] When Ruth Korn replied that she would get the money and drive to Arizona, appellant stated there wasn't time since the offer was only good till 4:00 P.M., that day. He said that if Ruth Korn would send $931 to the appellant by Western Union money order, he would buy the trailer and deliver it in Blythe, California, on January 18, 1961. [R. T. 24-25.]

On January 17, 1961, Ruth Korn sent the $931 by Western Union money order. On January 18, 1961, appellant cashed the money order in Glendale, Arizona. [R. T. 6-10, 26-27, Exs. 1, 2.]

Appellant did not deliver a trailer to Ruth Korn. [R. T. 27.]

Ruth Korn did not see or hear from the appellant after he received the $931. [R. T. 31, 58.]

Within a few days, Ruth Korn reported the matter to the Sheriff's Office; and, after being a fugitive from 1961, the appellant was finally located and apprehended in Walden, Colorado, on March 21, 1963, by agents of the Federal Bureau of Investigation. [R. T. 41, 61-62.]

IV.

ARGUMENT.

A. Appellant's Motions for Acquittal Were Properly Denied and the Verdict of the Jury Must Be Sustained.

Appellant concedes the occurrence of the interstate transactions as described in the Indictment. Appellant asserts, however, that the evidence was insufficient to warrant a finding that he was involved in any scheme to defraud. In support of his position the appellant relies on the following three cases:

Merrill v. United States, 95 F. 2d 669 (9 Cir. 1938), involved a stock selling scheme, wherein the evidence showed that the last sale of stock occurred approximately one year before the earliest mailing count in the Indictment. The Court held there was no presumption that the scheme continued after the stock sales ceased.

Mazurosky v. United States, 100 F. 2d 958 (9 Cir., 1939), involved the question of whether or not the defendant had knowledge of and participation in a mail fraud scheme operated by his acquaintances. The evidence clearly showed the defendant's knowledge that his acquaintances had operated a scheme to defraud ten years prior to the period covered by the Indictment. The Court held in essence that a conviction could not be based solely on evidence of association.

Pennsylvania Railroad v. Chamberlan, 288 U. S. 333 (1933) was a wrongful death action which held that judgment must go against the party having the burden of proof where the facts give equal support to opposite inferences. Appellant offers this case for the premise that the evidence in the instant case shows that the ap-

pellant was guilty of either fraud by wire or embezzlement, and therefore, the conviction cannot stand.

These cases are either factually distinguishable or inapplicable. The Government contends that the evidence establishes that appellant devised a scheme to defraud based on fraudulent promissory representations.

> "Some schemes may be promoted through mere representations and promises as to the future, yet, are none the less, schemes or artifices to defraud."
>
> *Durland v. United States,* 161 U. S. 306, 313 (1896).
>
> ". . . A purchaser is *entitled to receive what he has been led to believe he would receive.* He is defrauded if the promised expectations *do not* materialize."
>
> *United States v. Whitmore,* 97 Fed. Supp. 733, 735 (Dist. Ct. of Calif. S.D., 1951).

The hallmark of a scheme to defraud is dishonesty. It was for the jury to say if appellant's actions were innocent coincidences on the one hand, or culpable participation in a fraudulent scheme to get money on the other hand.

In determining the existence of a scheme to defraud and appellant's knowledge and intent the jury could consider the following facts:

Appellant was in need of money [R. T. 19-20, 32, 81-82, 93]; Ruth Korn had money; appellant initially attempted to obtain $5,000 from Ruth Korn. [R. T. 22]; appellant's ruse to prevent Ruth Korn from coming to Arizona to purchase the trailer [R. T. 24]; appellant unnecessarily cashed the money order [R. T.

86]; appellant cashed the money order on January 18, 1961, the day *after* the trailer deal had collapsed according to his own witness [R. T. 11, 13, 15]; appellant did not deliver a trailer to Ruth Korn [R. T. 27]; appellant did not telephone or contact Ruth Korn after he received the $931.00. [R. T. 27-28]; and appellant never returned the money to Ruth Korn. [R. T. 31.]

Bolen v. United States, 303 F. 2d 870 (9 Cir. 1962);

Hoffman v. United States, 249 F. 2d 338 (9 Cir. 1957).

The jury could have also considered the contradicted and in part incredible testimony of Leona Moore, the woman who had lived with appellant during the four years preceding the trial of this case. [R. T. 102]. She testified that she was with the appellant when he received the $931.00 money order and when the trailer owner refused to sell. [R. T. 88-90, 95.] Leona Moore testified that she and the appellant drove four to five hours from Arizona, at night for the sole purpose of returning the $931.00 to Ruth Korn. After repaying the money in cash for which they received no receipt, they immediately drove an additional four to five hours returning to Arizona. [R. T. 90-91, 96, 98.] Leona Moore's testimony that the money was returned was contradicted by Ruth Korn and also Mattie Van Horn. [R. T. 27-28, 58.]

Debardeleben, et al. v. United States, 307 F. 2d 362 (9 Cir. 1962).

Finally, the jury could consider the fact that the appellant made no attempt to produce the owner of the trailer. If in fact a trailer owner existed, the appel-

lant was in a position to identify this trailer owner or to give his last known address. Instead, the defense witness vaguely referred to the trailer owner as "the guy". [R. T. 87.] And the defense witness vaguely referred to the address of the trailer as in a trailer court on "a corner of some station,". [R. T. 87.]

> "The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable."
>
> *Graves v. United States,* 150 U. S. 118, 121 (1893).

See also:

Bisno v. United States, 299 F. 2d 711 (9 Cir. 1961), cert. den. 370 U. S. 952;

Samish v. United States, 223 F. 2d 358 (9 Cir. 1955), cert. den. 350 U. S. 848, reh. den. 350 U. S. 897;

United States v. Llamas, 280 F. 2d 392 (2 Cir. 1960).

The Government would submit that the facts of the instant case are completely analogous to the facts in *Ahrens v. United States,* 265 F. 2d 514 (5 Cir. 1959). The *Ahrens* case involved a violation of the fraud by wire statute. The essence of the scheme was that the defendant obtained money for the purpose of procuring a loan for the victim from an undisclosed principal. The victim did not see or hear from the defendant after he had received the money. The defendant did not return the money to the victim. The court held that the

facts clearly and convincingly supported the inference that a principal did not exist and that the entire scheme was merely a device to extract money from the victim.

Appellee respectfully submits that the evidence of a fraudulent scheme or device to obtain money or property and the use of interstate wires in furtherance thereof was sufficient to sustain the jury's verdict. Especially is this true when this court, as it must, considers the evidence and inferences that can be drawn from it most favorably to the Government.

Glasser v. United States, 315 U. S. 60 (1941);

Young v. United States, 298 F. 2d 108 (9 Cir. 1962), cert. den. 370 U. S. 953;

Benchwick v. United States, 297 F. 2d 330 (9 Cir. 1961);

Sandez v. United States, 239 F. 2d 239 (9 Cir. 1956).

"The rule for determining the sufficiency of circumstantial evidence on motions for acquittal was stated by this court in *Remmer v. United States,* 1953, 9 Cir. 205 F. 2d 277, 287, as follows:

" 'The test to be applied on motion for judgment of acquittal . . . is not whether in the trial court's opinion the evidence fails to exclude every hypothesis but that of guilt, but rather whether *as a matter of law* reasonable minds, as triers of the fact, *must* be in agreement that reasonable hypothesis other than guilt could be drawn from the evidence. . . . If reasonable mind *could* find

that the evidence excludes every reasonable hypothesis but that of guilt, the question is one of fact and must be submitted to the jury.' "

Bolen v. United States, 303 F. 2d 870, 874 (9 Cir. 1962).

The Government would submit that from an examination of all the evidence, reasonable minds could find that the evidence excludes every reasonable hypothesis but that the appellant's promise to purchase a house trailer for Ruth Korn was a fiction proffered as bait to obtain money. Therefore, the motions for acquittal were properly denied and the verdict of the jury must be sustained.

Farrell et al. v. United States, ... F. 2d ....., No. 18,241 (9 Cir. Aug. 7, 1963).

B. The Trial Court Properly Instructed on the Significance of Flight or Concealment.

Appellant specifies as error an instruction to the effect that flight or concealment of a person, if proved, may be considered by the jury in the light of all other proved facts on the question of guilt or innocence. [R. T. 123.] Appellant correctly represents that it is error to instruct a jury based on a conjectural state of facts for which there is no evidence.

United States v. Breitling, 81 U. S. 252 (1857).

A review of the record discloses that Ruth Korn did not see or hear from the appellant after he received the $931.00; that within a few days Ruth Korn reported the matter to the Sheriff's Office; that appellant was a fugitive from 1961 until he was located in Colorado in 1963. [R. T. 28-29, 31 41, 61-62.]

Clearly there was evidence justifying the instruction on flight or concealment.

Campbell v. United States, 221 F. 186 (9th Cir. 1915);

Edmonds v. United States, 273 F. 2d 108 (D.C. Cir. 1959);

United States v. Waldman, 240 F. 2d 449 (2d Cir. 1957).

C. The Trial Court Did Not Unduly Limit Cross-Examination.

During the cross-examination of Ruth Korn, counsel for the appellant asked, "Were you happy to see him go?", and "What was your reaction, Miss Korn, when the defendant said he was leaving?" [R. T. 43-44.] The Court sustained objections to both questions and appellant assigns these rulings as error.

Appellee submits that this complaint is frivolous. The two questions are in essence an identical inquiry; and although the trial Judge sustained objections, the witness proceeded to give an answer which was not stricken from the record.

Furthermore, the Judge properly exercised his discretion in limiting appellant's cross-examination on a subject unrelated to the issues of the case.

> "The extent of cross-examination rests in the sound discretion of the trial judge. Reasonable restriction of undue cross-examination, and the more rigorous exclusion of questions irrelevant to the substantial issues of the case, and of slight bearing on the bias and credibility of the witnesses, are not reversible errors."

District of Columbia v. Clawans, 300 U. S. 617, 632 (1937).

See also:

Beck v. United States, 298 F. 2d 622 (9 Cir. 1962), *cert. den.* 370 U. S. 919;

Robles v. United States, 279 F. 2d 401 (9 Cir., 1959), *cert. den.* 365 U. S. 836; reh. den. 365 U. S. 890;

Todorow v. United States, 173 F. 2d 439 (9 Cir. 1949), cert. den. 337 U. S. 925.

D. The Presence of the Jury When Appellant Offered Additional Objections to Instructions Was Not Prejudicial Error.

1. No Prejudice Resulted.

Appellant contends that the trial court committed prejudicial error by allowing counsel for appellant to object to instructions in the presence of the jury. In support of this contention, appellant relies on two decisions.

The first case is *Lovely v. United States,* 169 F. 2d 386 (4 Cir. 1948), cert. den. 338 U. S. 834, wherein the Court stated that a new trial should be granted when defense counsel is required to object to instructions in the presence of the jury *unless no prejudice resulted therefrom.*

In the second case of *Hodges v. United States,* 243 F. 2d 281 (5 Cir. 1957), the Court held that failure to comply with Rule 30, Federal Rules of Criminal Procedure, Title 18, United States Code, viewed in the light of the trial court's derogatory characterizations of defense counsel throughout the whole trial was reversible error.

Failure to take exceptions to the instructions outside the presence of the jury may constitute prejudicial

error when coupled with the element of judicial bias or condemnation. This premise is affirmed by the fact that the same appellate court which decided *Hodges v. United States, supra,* subsequently ruled in *Sultan v. United States,* 249 F. 2d 385 (5 Cir. 1957), that there was no error in setting forth objections to the charge in the jury's presence.

Appellee submits that any statements of the trial judge in noting appellant's objections to instructions were not prejudicial. These statements did not disclose a personal viewpoint concerning the merits of the case, nor did they besmirch the motives of counsel for either side.

Lau Lee v. United States, 67 F. 2d 156 (9 Cir. 1933);

United States v. Carmel, 267 F. 2d 345 (7 Cir. 1959);

United States v. Levi, 177 F. 2d 833 (7 Cir. 1949);

Vinci v. United States, 159 F. 2d 777 (D.C. Cir. 1947).

2. Alleged Error, if Any, Was Harmless.

Prior to argument, the trial court informed both counsel of the proposed jury instructions and also noted appellant's exceptions in compliance with Rule 30, Federal Rules of Criminal Procedure, Title 18, United States Code. [R. T. 103-115.]

Failure to inform counsel of proposed instructions and rulings on defendant's proposed instructions has been held harmless error.

United States v. Ford, 237 F. 2d 57 (2 Cir. 1956);

Steinberg v. United States, 162 F. 2d 120 (5 Cir. 1947).

After argument and instructions but before the jury retired for its verdict, the trial judge inquired if there were any objections. Appellant offered no objections. [R. T. 139.]

In the interim period, when the Court had directed Government counsel to proceed with final argument, appellant advised that he wished to object to jury instructions. [R. T. 116.] Appellant's request was beyond the scope of Rule 30, Federal Rules of Criminal Procedure, Title 18, U. S. C.

Appellee submits that any alleged error in allowing appellant to object to instructions in the presence of the jury was harmless for the following reasons: the trial court essentially complied with the provisions of Rule 30, Federal Rules of Criminal Procedure; appellant occasioned this additional hearing on objections; appellant did not request that the jury be excused; appellant did not object to failure to excuse the jury; the court did not prejudicially comment on appellant's objections; and the court gave the usual instructions concerning the acts and comments of the judge during the course of trial. [R. T. 128-129.]

United States v. Titus, 221 F. 2d 571 (2 Cir. 1955), cert. den. 350 U. S. 832;

United States v. Hall, 200 F. 2d 957 (2 Cir. 1953).

CONCLUSION.

For the reasons stated above, the judgment of the District Court should be affirmed.

Respectfully submitted,

FRANCIS C. WHELAN,
United States Attorney,

THOMAS R. SHERIDAN,
Assistant U. S. Attorney,
Chief, Criminal Section,

JO ANN DUNNE,
Assistant U. S. Attorney,

Attorneys for Appellee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Jo Ann Dunne